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August 28, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ASARCO INCORPORATED,

Defendant.

Civil No.

COMMENCEMENT BAY
NEARSHORE/TIDEFLATS
SUPERFUND SITE; ASARCO
SMELTER INTERIM
REMEDIAL
ACTION CONSENT DECREE



TABLE OF CONTENTS

I.	Background.	4
II.	Jurisdiction.	9
III.	Parties Bound.	10
IV.	Definitions.	11
V.	General Provisions.	16
VI.	Performance Of The Work By Asarco.	20
VII.	Additional Response Actions.	24
VIII.	EPA Periodic Review.	26
IX.	Quality Assurance, Sampling, And Data Analysis. . .	27
X.	Access.	30
XI.	Reporting Requirements.	32
XII.	Submissions Requiring EPA Approval.	36
XIII.	Project Coordinators.	38
XIV.	Assurance Of Ability To Complete Work.	39
XV.	Certification Of Completion.	41
XVI.	Emergency Response.	44
XVII.	Reimbursement Of Response Costs.	45
XVIII.	Indemnification And Insurance.	49
XIX.	Force Majeure.	52
XX.	Dispute Resolution.	55
XXI.	Stipulated Penalties.	60
XXII.	Covenants Not To Sue By Plaintiff.	65
XXIII.	Covenants By Asarco.	70

1	XXIV.	Effect Of Settlement.71
2	XXV.	Access To Information.	73
3	XXVI.	Retention Of Records.75
4	XXVII.	Notices And Submissions.	77
5	XXVIII.	Effective Date.78
6	XXIX.	Retention Of Jurisdiction.	79
7	XXX.	Termination of Consent Decree.	79
8	XXXI.	Appendices.79
9	XXXII.	Community Relations.	80
10	XXXIII.	Modification.80
11	XXXIV.	Lodging And Opportunity For Public Comment.81
12	XXXV.	Signatories/Service.	82

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11
12 CONSENT DECREE

13
14 I. BACKGROUND

15 1. The United States of America ("United States"), on
16 behalf of the Administrator of the United States Environmental
17 Protection Agency ("EPA"), filed a complaint in this matter
18 pursuant to Sections 106 and 107 of the Comprehensive
19 Environmental Response, Compensation, and Liability Act
20 ("CERCLA"), 42 U.S.C. §§ 9606, 9607 and Section 7003 of the
21 Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.
22 § 6973 against ASARCO Incorporated ("Asarco").

23 2. The United States in its complaint seeks:

24 (A) Reimbursement of costs incurred by EPA and the
25 Department of Justice for response actions conducted at

1 the Asarco Site, which is located adjacent to Ruston
2 and Tacoma, Washington, and within the Commencement Bay
3 Nearshore/Tideflats Superfund site (the "CB N/T site"),
4 together with accrued interest.

5 (B) Performance of certain response actions by Asarco at
6 the Asarco Site in conformity with the Record of
7 Decision (as defined below) and the National
8 Contingency Plan, 40 C.F.R. Part 300 (as amended)
9 ("NCP").

10 (C) Declaration of Asarco's liability for Future Response
11 Costs.

12 (D) Such other relief as the Court finds appropriate.

13 3. In accordance with the NCP and Section 121(f)(1)(F) of
14 CERCLA; 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of
15 Washington Department of Ecology (the "State") on March 29, 1991,
16 of negotiations with Asarco regarding the implementation of the
17 Remedial Design and Remedial Action for the Site, and EPA has
18 provided the State with an opportunity to participate in such
19 negotiations and be a party to this settlement.

20 4. In accordance with Section 122(j)(1) of CERCLA, 42
21 U.S.C. § 9622(j)(1), EPA notified the federal, state, and Indian
22 tribal natural resource trustees on March 29, 1991, of
23 negotiations with Asarco regarding the release of hazardous
24 substances that may have resulted in injury to the natural
25

1 resources under their trusteeship and encouraged the trustees to
2 participate in the negotiation of this Consent Decree. The
3 natural resource trustees for the CB N/T site are: (A) the
4 National Oceanic and Atmospheric Administration of the Department
5 of Commerce, (B) the Department of Interior, (C) the State of
6 Washington Department of Ecology (on behalf of the Washington
7 Departments of Fisheries, Natural Resources, and Wildlife), (D)
8 the Puyallup Tribe of Indians, and (E) the Muckleshoot Indian
9 Tribe (hereinafter collectively referred to as the "Natural
10 Resource Trustees").

11 5. In signing this Consent Decree, Defendant Asarco denies
12 any and all legal and equitable liability under any federal,
13 state, local or tribal statute, regulation, or common law for any
14 endangerment, nuisance, response, removal or remedial costs
15 incurred or to be incurred by the United States, the state of
16 Washington, or other person as a result of the release or threat
17 of release of hazardous substances to, at, from or near the Site.
18 Pursuant to 42 U.S.C. § 9622(d)(1)(B), entry of this Consent
19 Decree is not acknowledgement by Asarco that any release or
20 threatened release of a hazardous substance constituting an
21 imminent and substantial endangerment to human health or the
22 environment has occurred or exists at the site. Asarco does not
23 admit, and retains the right to controvert any of the factual or
24 legal statements or determinations made in this Consent Decree or
25

1 its appendices in any judicial or administrative proceeding,
2 except an action to enforce this Consent Decree. Asarco does
3 agree, however, to this Court's jurisdiction over this matter.
4 This Consent Decree shall not be admissible in any judicial or
5 administrative proceeding as proof of liability or an admission
6 of any fact dealt with herein, but it shall be admissible in an
7 action to enforce this Consent Decree.

8 6. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA
9 placed the Site on the National Priorities List, set forth at 40
10 C.F.R. Part 300, Appendix B, by publication in the Federal
11 Register on September 8, 1983, 48 Fed. Reg. 40,658.

12 7. Because of the complexity of the CB N/T site, Superfund
13 response actions at the CB N/T site are currently coordinated
14 under seven separate operable units managed primarily by EPA and
15 Ecology, including: (i) Operable Unit 01 -- CB N/T Sediments;
16 (ii) Operable Unit 02 -- Asarco Tacoma Smelter; (iii) Operable
17 Unit 03 -- Tacoma Tar Pits; (iv) Operable Unit 04 -- Asarco Off-
18 Property; (v) Operable Unit 05 -- CB N/T Sources; (vi) Operable
19 Unit 06 -- Asarco Sediments; and (vii) Operable Unit 07 -- Asarco
20 smelter demolition. This Consent Decree involves Operable
21 Unit 07.

22 8. Pursuant to an Administrative Order on Consent dated
23 September, 1986, Asarco agreed to perform immediate site
24 stabilization activities at the site and to conduct a remedial
25

1 investigation/feasibility study (RI/FS) of the Asarco smelter and
2 the surrounding area to determine the nature and extent of
3 contamination and to evaluate alternatives for cleanup of the
4 site.

5 9. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, and
6 based on information in the draft remedial investigation and
7 feasibility study, EPA issued the proposed plan for an interim
8 Remedial Action at the Asarco smelter facility on July 16, 1990,
9 and provided an opportunity for written and oral comment from the
10 public on the proposed interim Remedial Action through September
11 18, 1990. A copy of the transcript of the public meeting on the
12 proposed plan held on August 16, 1990, is available to the public
13 as part of the administrative record upon which the Regional
14 Administrator based the selection of the response action.

15 10. The decision by EPA on the interim Remedial Action to
16 be implemented at the Site is embodied in a final Record of
17 Decision ("ROD"), signed by the EPA Region 10 Regional
18 Administrator on December 31, 1990, on which the state of
19 Washington has given its concurrence. (A copy of the ROD is
20 attached hereto as Appendix A.) The ROD includes a
21 responsiveness summary to the public comments. Notice of the
22 final plan was published in accordance with Section 117(b) of
23 CERCLA.

1 11. Based on the information presently available to EPA,
2 EPA believes that the Work will be properly and promptly
3 conducted by Asarco.

4 12. The interim Remedial Action selected by the ROD and the
5 Work to be performed by Asarco shall constitute a response action
6 taken or ordered by the President for the purposes of Section
7 113(j) of CERCLA.

8 13. The Parties recognize, and the Court by entering this
9 Consent Decree finds, that implementation of this Consent Decree
10 will expedite the cleanup of the Site and will avoid prolonged
11 and complicated litigation between the Parties, that the Parties
12 negotiated this Consent Decree in good faith, and that this
13 Consent Decree is fair, reasonable, and in the public interest.

14 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

15
16 II. JURISDICTION

17 14. This Court has jurisdiction over the subject matter of
18 this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C.
19 §§ 9606, 9607, and 9613(b). This Court also has personal
20 jurisdiction over Asarco, which solely for the purposes of this
21 Consent Decree and the underlying complaint, waives all
22 objections and defenses that it may have to the jurisdiction of
23 this Court or to venue in this District. Asarco shall not

1 challenge the terms of this Consent Decree or this Court's
2 jurisdiction to enter and enforce this Consent Decree.

4 III. PARTIES BOUND

5 15. This Consent Decree applies to and is binding upon the
6 United States and upon Asarco and its heirs, agents, successors
7 and assigns. Any change in ownership or corporate status of
8 Asarco including, but not limited to, any transfer of assets or
9 real or personal property shall in no way alter Asarco's
10 responsibilities under this Consent Decree.

11 16. Asarco shall provide a copy of this Consent Decree to
12 each contractor hired to perform Work (as defined below) that is
13 required by this Consent Decree and to each person representing
14 Asarco with respect to the Site or the Work and shall condition
15 all contracts entered into hereunder upon performance of the Work
16 in conformity with the terms of this Consent Decree. Asarco or
17 its contractors shall provide written notice of the Consent
18 Decree to all subcontractors hired to perform any portion of the
19 Work required by this Consent Decree. Asarco shall nonetheless
20 be responsible for ensuring that its contractors and
21 subcontractors perform the Work contemplated herein in accordance
22 with this Consent Decree. With regard to the activities
23 undertaken pursuant to this Consent Decree, each contractor and
24 subcontractor shall be deemed to be in a contractual relationship

1 with Asarco within the meaning of Section 107(b)(3) of CERCLA, 42
2 U.S.C. § 9607(b)(3).

4 IV. DEFINITIONS

5 17. Unless otherwise expressly provided herein, terms used
6 in this Consent Decree which are defined in CERCLA or in
7 regulations promulgated under CERCLA shall have the meaning
8 assigned to them in CERCLA or in such regulations. Whenever
9 terms listed below are used in this Consent Decree or in the
10 appendices attached hereto and incorporated hereunder, the
11 following definitions shall apply:

12 (A) "CERCLA" shall mean the Comprehensive Environmental
13 Response, Compensation, and Liability Act of 1980, as
14 amended, 42 U.S.C. §§ 9601 et seq.

15 (B) "Commencement Bay Nearshore/Tideflats Superfund site"
16 ("CB N/T site") shall mean the area designated on the
17 National Priorities List in September, 1983, as the
18 CB N/T site, which is located at the southern end of
19 the main basin of Puget Sound, near the City of Tacoma,
20 Washington.

21 (C) "Consent Decree" shall mean this Decree and all
22 appendices attached hereto. In the event of conflict
23 between this Decree and any appendix, this Decree shall
24 control.

1 (D) "Contractor" or "Subcontractor" means the company or
2 companies retained by or on behalf of Asarco to
3 undertake and accomplish the Work and associated
4 activities required by this Consent Decree.

5 (E) "Day" shall mean a calendar day unless expressly stated
6 to be a working day. "Working day" shall mean a day
7 other than a Saturday, Sunday, or Federal holiday. In
8 computing any period of time under this Consent Decree,
9 where the last day would fall on a Saturday, Sunday, or
10 federal holiday, the period shall run until the close
11 of business of the next working day.

12 (F) "Ecology" shall mean the State of Washington Department
13 of Ecology.

14 (G) "EPA" shall mean the United States Environmental
15 Protection Agency and any successor departments or
16 agencies of the United States.

17 (H) "Future Response Costs" shall mean all direct and
18 indirect investigation, enforcement, and response costs
19 that the United States, including EPA and the U.S.
20 Department of Justice, incurs in overseeing the Work or
21 otherwise implementing or enforcing this Consent
22 Decree, that are not inconsistent with the National
23 Contingency Plan. Future Response Costs shall also
24 include all such costs incurred by the United States in
25

1 connection with the Site between December 31, 1990, and
2 the effective date of this Consent Decree.

3 (I) "General Contractor" shall mean the contractor retained
4 by Asarco to carry out the Work under this Consent
5 Decree.

6 (J) "National Contingency Plan" or "NCP" shall mean the
7 National Oil and Hazardous Substances Pollution
8 Contingency Plan promulgated pursuant to Section 105 of
9 CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part
10 300, including, but not limited to, any amendments
11 thereto.

12 (K) "Operation and Maintenance" or "O&M" shall mean all
13 activities required to maintain the effectiveness of
14 the Remedial Action as required under the Operation and
15 Maintenance Plan approved or developed by EPA pursuant
16 to this Consent Decree and the Statement of Work (SOW).

17 (L) "Paragraph" shall mean a portion of this Consent Decree
18 identified by an arabic numeral or an upper case
19 letter.

20 (M) "Parties" shall mean the United States and Asarco.

21 (N) "Past Response Costs" shall mean all direct and
22 indirect costs (as defined in Paragraph 17(H), "Future
23 Response Costs," above) that the United States incurred
24

1 with regard to the Site prior to December 31, 1990, and
2 applicable interest.

3 (O) "Plaintiff" shall mean the United States.

4 (P) "RCRA" shall mean the Solid Waste Disposal Act, as
5 amended, 42 U.S.C. §§ 6901 et seq. (also known as the
6 Resource Conservation and Recovery Act).

7 (Q) "Record of Decision" or "ROD" shall mean the EPA Record
8 of Decision relating to Operable Unit 07 at the Site,
9 signed on December 31, 1990, by the Regional
10 Administrator, EPA Region 10, and all attachments
11 thereto. (A copy of the ROD is attached hereto as
12 Appendix A).

13 (R) "Remedial Action" shall mean those activities, except
14 for Operation and Maintenance, to be undertaken by
15 Asarco to implement the final plans and specifications
16 submitted by Asarco pursuant to the Work Plans approved
17 by EPA. Under the ROD and this Consent Decree, the
18 Remedial Action is an interim Remedial Action at the
19 Asarco smelter facility.

20 (S) "Remedial Design" shall mean those activities to be
21 undertaken by Asarco to develop the final plans and
22 specifications for the interim Remedial Action pursuant
23 to Work Plans approved by EPA.

- 1 (T) "Section" shall mean a portion of this Consent Decree
2 identified by a roman numeral.
- 3 (U) "Settling Defendant" shall mean Asarco.
- 4 (V) "Settling Parties" shall mean the United States and
5 Asarco.
- 6 (W) "Site," for purposes of this Consent Decree, shall mean
7 the Asarco smelter facility, which is approximately
8 sixty-seven (67) acres in size, located in Ruston and
9 Tacoma, Washington, depicted more particularly on the
10 map attached as Appendix C, and all suitable areas in
11 very close proximity to the facility that are necessary
12 for implementation of this interim Remedial Action.
- 13 (X) "State" shall mean the state of Washington Department
14 of Ecology and any successor departments or agencies of
15 the state.
- 16 (Y) "Statement of Work" or "SOW" shall mean the statement
17 of work for implementation of the Remedial Design,
18 Remedial Action, and Operation and Maintenance at the
19 Site, as set forth in Appendix B to this Consent Decree
20 and any modifications made in accordance with Section
21 XXXIII (Modification) of this Consent Decree.
- 22 (Z) "United States" shall mean the United States of
23 America.
- 24
25
26

1 (AA) "Work" shall mean all activities that Asarco is
2 required to perform under this Consent Decree, except
3 those required by Section XXVI (Retention of Records).

4 (BB) "Work Plans" shall mean the Work Plans required under
5 Paragraphs 31 and 32 of this Consent Decree and
6 described in the Statement of Work.

7
8 V. GENERAL PROVISIONS

9 A. Objectives of the Parties

10 18. The objectives of the Settling Parties in entering into
11 this Consent Decree are to protect public health and welfare and
12 the environment from releases or threatened releases of hazardous
13 substances, pollutants or contaminants from the Site by the
14 design and implementation of the Remedial Action and Operation
15 and Maintenance at the Site by Asarco and to reimburse response
16 costs of the Plaintiff.

17
18 B. Commitments by Asarco

19 19. Asarco shall finance and perform the Work in accordance
20 with this Consent Decree, as more fully described in the
21 Statement of Work, and Asarco shall also reimburse the United
22 States for Past Response Costs and Future Response Costs as
23 provided in this Consent Decree.

1 C. Compliance With Applicable Law

2 20. Consistent with CERCLA and/or the NCP, except as
3 provided in paragraph 21 below, all activities undertaken by
4 Asarco pursuant to this Consent Decree shall be performed in
5 accordance with the requirements of all applicable federal and
6 state laws and regulations. The United States has determined
7 that the Work and the activities required to perform the Work
8 under this Consent Decree are consistent with the NCP.

9
10 D. Permits

11 21. As provided in Section 121(e) of CERCLA and the NCP, no
12 permit shall be required for any portion of the Work conducted
13 entirely on the Site, provided, however, as specified in the ROD,
14 operation of the on-site incinerator shall be in compliance with
15 a permit issued by the Puget Sound Air Pollution Control
16 Authority ("PSAPCA"). Where any portion of the Work requires a
17 federal or state permit or approval, Asarco shall timely submit
18 applications and take all other actions necessary to obtain all
19 such permits or approvals in a timely manner.

20 22. Asarco may seek relief under the provisions of Section
21 XIX (Force Majeure) of this Consent Decree for any delay in the
22 performance of the Work resulting from a failure to obtain, or a
23 delay in obtaining, any permit required for the Work.

1 23. This Consent Decree is not, and shall not be construed
2 to be, a permit issued pursuant to any federal or state statute
3 or regulation.
4

5 E. Notice of Obligations to Successors-in-Title

6 24. Within fifteen (15) days after the entry of this
7 Consent Decree, Asarco shall submit for EPA approval under
8 Section XII a legal description suitable for recording of the
9 property comprising the Site and a summary of the terms of this
10 Consent Decree. This summary shall include a description of
11 where the full Consent Decree can be found. Upon approval of
12 such property description and summary, Asarco shall have fifteen
13 (15) days to submit for recording by the Recorder's Office,
14 Pierce County, State of Washington, the summary of the terms of
15 this Consent Decree approved by EPA. Thereafter, each deed,
16 title, or other instrument of conveyance for property included in
17 the Site shall contain a notice stating that the property is
18 subject to this Consent Decree and any lien retained by the
19 United States and shall reference the recorded location of the
20 Consent Decree and any restrictions applicable to the property
21 under this Consent Decree. Upon termination of this Consent
22 Decree under Section XXX, Asarco may submit for recording the
23 Order of this Court terminating this Consent Decree.
24
25

1 25. The obligations of Asarco with respect to the provision
2 of access under Section X (Access) shall be binding upon Asarco
3 and any and all persons who subsequently acquire any interest in
4 the Site or portion thereof (hereinafter "Successors-in-Title").
5 Within fifteen (15) days after the entry of this Consent Decree,
6 Asarco shall record at the Recorder's Office, Pierce County,
7 state of Washington, a notice of obligation to provide access
8 under Section X (Access). Each subsequent deed to any such
9 property included in the Site shall reference the recorded
10 location of such notice and covenants applicable to the property.

11 26. Asarco and any Successor-in-Title shall, at least
12 thirty (30) days prior to the conveyance of any interest in the
13 Site or portion thereof, give written notice of this Consent
14 Decree to the grantee and written notice to EPA of the proposed
15 conveyance, including the name and address of the grantee, and
16 the date on which notice of the Consent Decree was given to the
17 grantee. In the event of any such conveyance, Asarco's
18 obligations under this Consent Decree shall continue to be met by
19 Asarco. In addition, if EPA approves, the grantee may perform
20 some or all of the Work under this Consent Decree. In no event
21 shall the conveyance of an interest in property that includes, or
22 is a portion of, the Site release or otherwise affect the
23 liability of Asarco to comply with the Consent Decree.

1 27. In the event of an involuntary conveyance (including,
2 but not limited to, condemnation by the state or a municipality)
3 of an interest in property that includes all or a portion of the
4 Site, Asarco's obligations under this Consent Decree shall
5 continue to be met by Asarco. In the event of such involuntary
6 conveyance, Asarco shall use its best efforts to secure access to
7 the Site for Asarco and for EPA and its representatives in
8 accordance with Paragraph 49 of this Consent Decree, as necessary
9 to effectuate the provisions of this Decree. Any interference
10 with Asarco's ability to effectuate the terms of this Decree by
11 any entity that may take all or any portion of the property by
12 involuntary conveyance may be considered a "Force Majeure" event,
13 to be determined under the provisions in Section XIX of this
14 Consent Decree. Nothing in this Paragraph or in this Decree
15 shall be construed to waive or otherwise affect any liability
16 that any entity taking all or any portion of the Site by
17 involuntary conveyance may have under applicable law, including
18 CERCLA.

19
20 VI. PERFORMANCE OF THE WORK BY ASARCO

21 A. Selection of General Contractor

22 28. All aspects of the Work to be performed by Asarco
23 pursuant to Sections VI (Performance of the Work by Asarco), VII
24 (Additional Response Actions), VIII (EPA Periodic Review), and IX
25

1 (Quality Assurance, Sampling and Data Analysis) of this Consent
2 Decree shall be under the direction and supervision of the
3 General Contractor, the selection of which shall be subject to
4 disapproval by EPA. Any disapproval by EPA of Asarco's selection
5 of the General Contractor shall be subject to the provisions of
6 Section XX (Dispute Resolution). Within sixty (60) days after
7 the entry of this Consent Decree, Asarco shall notify EPA in
8 writing of the name, title, and qualifications of any contractor
9 proposed to be the General Contractor. If at any time
10 thereafter, Asarco proposes to change the General Contractor,
11 Asarco shall give notice to EPA of the proposed new General
12 Contractor, the selection of which shall be subject to
13 disapproval by EPA, before the new General Contractor performs,
14 directs, or supervises any Work under this Consent Decree.

15 29. EPA will notify Asarco in writing of its disapproval of
16 a proposed General Contractor. If EPA disapproves of the
17 selection of any contractor as General Contractor, Asarco shall
18 either invoke the provisions of Section XX (Dispute Resolution)
19 or submit to EPA, a list of contractors, including the
20 qualifications of each contractor, that would be acceptable to
21 them within thirty (30) days of receipt of EPA's disapproval of
22 the contractor previously selected. EPA will provide written
23 notice of the names of the contractor(s) that it approves.
24 Asarco may select any approved contractor from that list and
25

1 shall notify EPA of the name of the contractor selected within
2 twenty-one (21) days of EPA's designation of approved
3 contractors. If EPA fails to provide written notice of its
4 approval or disapproval of the names on the list as provided in
5 this Paragraph and this failure prevents Asarco from meeting one
6 or more deadlines in a plan approved by the EPA pursuant to this
7 Consent Decree, Asarco may seek relief under the provisions of
8 Section XIX (Force Majeure) hereof.

9
10 B. Remedial Design/Remedial Action

11 30. In order to expedite the design of the Remedial Action
12 at the Site, Asarco may choose to commence work on the Work Plans
13 described in Paragraphs 31 and 32 and in the Statement of Work
14 (SOW) prior to entry of this Consent Decree by this Court. Such
15 Work Plans must be approved by EPA pursuant to Section XII
16 (Submissions Requiring EPA Approval) prior to implementation and
17 all oversight response costs incurred by EPA in connection with
18 the review of such Work Plans prior to the entry of the Consent
19 Decree shall be reimbursed after entry in accordance with Section
20 XVII (Reimbursement of Response Costs).

21 31. Within thirty (30) days after entry of this Consent
22 Decree, Asarco shall submit to EPA, a Management Strategy Plan in
23 accordance with the requirements of the Statement of Work.

1 32. Within sixty (60) days after entry of this Consent
2 Decree, Asarco shall submit to EPA, Work Plans for the design and
3 implementation of the interim Remedial Action at the Site in
4 accordance with the requirements of the Statement of Work. Upon
5 approval of the Work Plans by EPA, they shall be incorporated
6 into and become enforceable under this Consent Decree.

7 33. Upon approval of the Work Plans by EPA, Asarco shall
8 implement the Work Plans. Asarco shall submit all plans,
9 submittals, or other deliverables required under the approved
10 Work Plans in accordance with the approved schedule for review
11 and approval pursuant to Section XII (Submissions Requiring EPA
12 Approval). Unless otherwise directed by EPA, Asarco shall not
13 commence physical on-site activities to be performed under the
14 Statement of Work prior to approval of the Work Plans.

15 34. Asarco shall, prior to any off-Site shipment of waste
16 material from the Site to an out-of-state waste management
17 facility, provide written notification to the appropriate state
18 environmental official in the receiving facility's state and to
19 the EPA Project Coordinator of such shipment of waste material.
20 However, this notification requirement shall not apply to any
21 off-Site shipments when the total volume of all such shipments
22 will not exceed ten (10) cubic yards.

1 35. Asarco shall include in the written notification
2 required under Paragraph 34 the following information, where
3 available:

4 (A) The name and location of the facility to which the
5 waste material are to be shipped.

6 (B) The type and quantity of the waste material to be
7 shipped.

8 (C) The expected schedule for the shipment of the waste
9 material.

10 (D) The method of transportation.

11 Asarco shall notify the state in which the planned receiving
12 facility is located of major changes in the shipment plan, such
13 as a decision to ship the waste material to another facility
14 within the same state, or to a facility in another state.

15 36. The identity of the receiving facility and state under
16 Paragraph 34 will be determined by Asarco following the award of
17 the contract for interim Remedial Action construction. Asarco
18 shall provide the information required by Paragraph 35 as soon as
19 practicable after the award of the contract and before the waste
20 material is actually shipped.

21
22 VII. ADDITIONAL RESPONSE ACTIONS

23 37. In the event that EPA or Asarco determines that
24 additional response actions are necessary to meet the
25

1 requirements of this Consent Decree or the Statement of Work,
2 notification of such determination shall be provided to the
3 Project Coordinator for the other party.

4 38. Within thirty (30) days of receipt of notice from EPA
5 pursuant to Paragraph 37 that additional response actions are
6 necessary or such longer time as may be specified by EPA, Asarco
7 shall submit for approval by EPA, a Supplemental Work Plan for
8 the additional response actions. Upon approval of the
9 Supplemental Work Plan pursuant to Section XII (Submissions
10 Requiring EPA Approval), Asarco shall implement the plan for
11 additional response actions in accordance with the schedule
12 contained therein.

13 39. Any additional response actions that Asarco determines
14 are necessary to meet the requirements of this Consent Decree or
15 Statement of Work shall be subject to approval by EPA, and, if
16 authorized by EPA, shall be completed by Asarco in accordance
17 with plans, specifications, and schedules approved by EPA
18 pursuant to Section XII (Submissions Requiring EPA Approval).

19 40. Asarco may invoke the procedures set forth in Section
20 XX (Dispute Resolution) to dispute EPA's determination that
21 additional response actions are necessary to meet the
22 requirements of this Consent Decree or Statement of Work. Such a
23 dispute shall be resolved pursuant to Section XX (Dispute
24 Resolution) of this Consent Decree.

VIII. EPA PERIODIC REVIEW

41. At least every five years, if required by CERCLA § 121(c) and any applicable regulation, Asarco shall conduct necessary and appropriate studies and investigations as requested by EPA in order to permit EPA to reconsider whether this interim Remedial Action is protective of human health and the environment. This requirement shall remain in effect until the final remedial action for the cleanup of the Asarco smelter site has been completed.

42. If required by Sections 113(k)(2) or 117 of CERCLA, Asarco and the public will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of any review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the public comment period. After the period for submission of written comments is closed, the Regional Administrator, EPA Region 10, or his/her delegate will determine in writing whether further response actions are appropriate.

43. If the Regional Administrator, EPA Region 10, or his/her delegate determines that information received, in whole or in part, during the review conducted pursuant to Section 121(c) of CERCLA, indicates that the Remedial Action is not protective of human health and the environment, Asarco shall

1 undertake any further response actions EPA has determined are
2 appropriate and that are not barred under the Covenant Not to
3 Sue. Asarco shall submit a plan for such work to EPA for
4 approval in accordance with the procedures set forth in Section
5 VI (Performance of the Work by Asarco) and shall implement the
6 plan approved by EPA. However, Asarco may invoke the procedures
7 set forth in Section XX (Dispute Resolution) to dispute: (A)
8 EPA's determination that the remedial action is not protective of
9 human health and the environment, or (B) EPA's selection of the
10 further response actions ordered. Such a dispute shall be
11 resolved pursuant to Section XX (Dispute Resolution) of this
12 Consent Decree.

13
14 IX. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

15 44. Asarco shall use quality assurance, quality control,
16 and chain of custody procedures for all environmental,
17 treatability, design, compliance and monitoring samples in
18 accordance with EPA's "Interim Guidelines and Specifications For
19 Preparing Quality Assurance Project Plans," December 1980, (QAMS-
20 005/80); "Data Quality Objective Guidance," (EPA/540/G87/003 and
21 004); "EPA NEIC Policies and Procedures Manual," May 1978,
22 revised November 1984, (EPA 330/9-78-001-R); and subsequent
23 amendments to such guidelines upon written notification to Asarco
24 of such amendment by EPA. Amended guidelines shall apply only to
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1 procedures conducted after such notification. Prior to the
2 commencement of any monitoring project under this Consent Decree,
3 Asarco shall submit for approval by EPA, a Quality Assurance
4 Project Plan ("QAPP") to EPA and the State that is consistent
5 with the SOW, the NCP, and applicable guidance documents. If
6 relevant to the proceeding, validated sampling data generated in
7 accordance with the QAPP(s) and reviewed and approved by EPA
8 shall be admissible as evidence, without objection, in any
9 proceeding under this Decree. Asarco shall assure that EPA and
10 its authorized representatives are allowed access to all
11 laboratories utilized by Asarco in implementing this Consent
12 Decree. In addition, Asarco shall assure that such laboratories
13 shall analyze all samples submitted by EPA pursuant to the QAPP
14 for quality assurance monitoring. Asarco shall ensure that the
15 laboratories utilized by them for the analysis of samples taken
16 pursuant to this Decree perform all analyses according to
17 accepted EPA methods. Accepted EPA methods consist of those
18 methods which are documented in the "Contract Lab Program
19 Statement of Work for Inorganic Analysis" and the "Contract Lab
20 Program Statement of Work for Organic Analysis," dated February
21 1988, and any amendments made thereto during the course of the
22 implementation of this Decree. Asarco shall ensure that all
23 laboratories used by them for analysis of samples taken pursuant
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1 to this Consent Decree participate in an EPA or EPA-equivalent
2 QA/QC program.

3 45. Upon request, Asarco shall allow split or duplicate
4 samples to be taken by EPA or its authorized representatives.
5 Asarco shall notify EPA not less than ten (10) days in advance of
6 any sample collection activity unless such sample collection
7 activity is routine and part of a Work Plan approved by EPA. In
8 addition, EPA shall have the right to take any additional samples
9 related to the performance of the Work that EPA deems necessary.
10 EPA shall provide reasonable notice to Asarco whenever such
11 additional samples will be taken. Upon request, EPA shall allow
12 Asarco to take split or duplicate samples of any samples EPA
13 takes as part of EPA's oversight of Asarco's implementation of
14 the Work.

15 46. Within seven (7) days of a request by EPA, Asarco shall
16 submit to EPA, four (4) copies of the results of all sampling
17 and/or tests or other data obtained or generated by or on behalf
18 of Asarco with respect to implementation of this Consent Decree.

19 47. Notwithstanding any provision of this Consent Decree,
20 the United States hereby retains all of its information gathering
21 and inspection authorities and rights, including enforcement
22 actions related thereto, under CERCLA, RCRA and any other
23 applicable statutes or regulations.

1 X. ACCESS

2 48. Commencing upon the date of entry of this Consent
3 Decree, Asarco agrees that the United States and its
4 representatives, including EPA and its contractors, shall have
5 access to the Site and any other property to which access is
6 required for the implementation of this Consent Decree, to the
7 extent access to the property is controlled by Asarco, for the
8 purposes of conducting any activity related to this Consent
9 Decree including, but not limited to:

10 (A) Monitoring the Work.

11 (B) Verifying any data or information submitted to the
12 United States in connection with this Consent Decree.

13 (C) Conducting such tests, investigations, or sample
14 collections as deemed necessary to monitor compliance
15 with this Consent Decree.

16 (D) Assessing the need for, planning, or implementing
17 additional response actions at or near the Site.

18 (E) Inspecting and copying records, operating logs,
19 contracts, or other documents maintained or generated
20 by Asarco or its agents or contractors for the Work
21 undertaken pursuant to this Consent Decree.

22 (F) Assessing Asarco's compliance with this Consent Decree.

23 49. To the extent that the Site or any other property to
24 which access is required for the implementation of this Consent
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1 Decree is owned or controlled by persons other than Asarco,
2 Asarco shall use best efforts to secure from such persons access
3 for Asarco, as well as for the United States and its
4 representatives, including, but not limited to, EPA and its
5 contractors, as necessary to effectuate this Consent Decree. For
6 purposes of this Paragraph "best efforts" includes the payment of
7 compensation where required under law for use of the property to
8 which access is obtained. If any access required to complete the
9 Work is not obtained within forty-five (45) days of the date of
10 entry of this Consent Decree, or within forty-five (45) days of
11 the date EPA notifies Asarco in writing that additional access
12 beyond that previously secured is necessary, whichever is later,
13 Asarco shall promptly notify EPA, and shall include in that
14 notification a summary of the steps Asarco has taken to attempt
15 to obtain access. The United States may, as it deems
16 appropriate, assist Asarco in obtaining access. Asarco shall
17 reimburse the United States, in accordance with the procedures in
18 Section XVII (Reimbursement of Response Costs), for all costs
19 incurred by the United States in obtaining access.

20 50. Notwithstanding any provision of this Consent Decree,
21 the United States retains all of its access authorities and
22 rights, including enforcement authorities related thereto, under
23 CERCLA, RCRA, and any other applicable statute or regulations.
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1 XI. REPORTING REQUIREMENTS

2 51. In addition to any other requirement of this Consent
3 Decree, Asarco shall submit to EPA, four (4) copies of written
4 monthly progress reports that:

5 (A) Describe the actions which have been taken toward
6 achieving compliance with this Consent Decree during
7 the previous month.

8 (B) Include a summary of all results of sampling and tests
9 and all other data received or generated by Asarco or
10 its contractors or agents in connection with
11 implementation of this Consent Decree in the previous
12 month unless such information has already been
13 submitted to EPA.

14 (C) Identifies all work plans, plans, and other
15 deliverables required by this Consent Decree completed
16 and submitted during the previous month.

17 (D) Describe all actions, including, but not limited to,
18 data collection and implementation of work plans, which
19 are scheduled for the next month and provide other
20 information relating to the progress of activities
21 required by the approved Work Plans, including, but not
22 limited to, critical path diagrams, Gantt charts, and
23 Pert charts.

1 (E) Include information regarding percentage of completion,
2 unresolved delays encountered or anticipated that may
3 affect the future schedule for implementation of the
4 Work, and a description of efforts made to mitigate
5 those delays or anticipated delays.

6 (F) Include any modifications to the work plans or other
7 schedules that Asarco has proposed to EPA or that have
8 been approved by EPA.

9 (G) Describe all activities undertaken pursuant to Section
10 XXXII (Community Relations) in support of EPA's
11 Community Relations Plan during the previous month and
12 those to be undertaken in the next month.

13 Asarco shall submit these progress reports to EPA by the tenth
14 day of every month following the entry of this Consent Decree
15 until EPA notifies Asarco pursuant to Paragraph 70 of Section XV
16 (Certification of Completion). If requested by EPA, Asarco shall
17 also provide briefings for EPA to discuss the progress of the
18 Work. Further, Asarco shall describe in a separate Close-Out
19 Report how all activities required by this Consent Decree and
20 Statement of Work have been accomplished. This Close-Out Report
21 shall be submitted in conjunction with the Certification of
22 Completion required under paragraph 68 below.

23 52. Asarco shall notify EPA of any change in the schedule
24 described in the monthly progress report for the performance of
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1 any activity, including, but not limited to, data collection and
2 implementation of work plans, no later than seven (7) days prior
3 to the performance of the activity.

4 53. Upon the occurrence of any event during performance of
5 the Work that Asarco is required to report pursuant to Section
6 103 of CERCLA or Section 304 of the Emergency Planning and
7 Community Right-To-Know Act (EPCRA), Asarco shall within twenty-
8 four (24) hours of the onset of such event orally notify the EPA
9 Project Coordinator or the Alternate EPA Project Coordinator (in
10 the event of the unavailability of the EPA Project Coordinator),
11 or, in the event that neither the EPA Project Coordinator or
12 Alternate EPA Project Coordinator is available, the Superfund
13 Response/Investigation Section, EPA Region 10. These reporting
14 requirements are in addition to the reporting required by CERCLA
15 Section 103 or EPCRA Section 304. Within twenty (20) days of the
16 onset of such an event, Asarco shall furnish to EPA a written
17 report, signed by Asarco's Project Coordinator, setting forth the
18 events which occurred and the measures taken, and to be taken, in
19 response thereto. Within thirty (30) days of the conclusion of
20 such an event, Asarco shall submit a report setting forth all
21 actions taken in response thereto. Reports submitted in
22 compliance with other laws that include information required by
23 this Consent Decree may be submitted under this Consent Decree
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1 and may be appended to a regular monitoring report rather than
2 submitted to EPA separately.

3 54. Until termination of this Consent Decree pursuant to
4 Section XXX (Termination of Consent Decree), Asarco shall submit
5 to EPA each year, within thirty (30) days of the anniversary of
6 the entry of the Consent Decree, a report setting forth the
7 status of the Work, which shall at a minimum include a statement
8 of major milestones accomplished in the preceding year, a
9 statement of tasks remaining to be accomplished, and a schedule
10 for implementation of the remaining Work. Asarco shall submit
11 four (4) copies of the report to EPA and two (2) copies to the
12 State.

13 55. Asarco shall submit four (4) copies of all plans,
14 reports, and data required by the SOW, the Work Plans, or any
15 other approved plans to EPA in accordance with the schedules set
16 forth in such plans. Asarco shall simultaneously submit two (2)
17 copies of all such plans, reports and data to the State.

18 56. All reports and other documents submitted by Asarco to
19 EPA (other than the monthly progress reports referred to above)
20 which purport to document Asarco's compliance with the terms of
21 this Consent Decree shall be signed by an authorized
22 representative of Asarco.

1 XII. SUBMISSIONS REQUIRING EPA APPROVAL

2 57. After review of any plan, report, or other item that is
3 required to be submitted for approval pursuant to this Consent
4 Decree, EPA shall:

- 5 (A) Approve, in whole or in part, the submission.
6 (B) Approve the submission upon specified conditions.
7 (C) Modify the submission to cure the deficiencies.
8 (D) Direct that Asarco modify the submission.
9 (E) Disapprove, in whole or in part, the submission,
10 notifying Asarco of deficiencies, or
11 (F) Any combination of the above.

12 58. In the event of approval, approval upon conditions, or
13 modification by EPA, Asarco shall proceed to take any action
14 required by the plan, report, or other item, as approved or
15 modified by EPA subject only to Asarco's right to invoke the
16 Dispute Resolution procedures set forth in Section XX (Dispute
17 Resolution) with respect to the modifications or conditions made
18 by EPA.

19 59. Upon receipt of a notice of disapproval or a notice
20 requiring a modification, Asarco shall, within fourteen (14) days
21 or such other time as reasonably specified by EPA in such notice,
22 correct the deficiencies and resubmit the plan, report, or other
23 item for approval. Notwithstanding the notice of disapproval or
24 a notice requiring a modification, Asarco shall proceed, at the
25

1 direction of EPA, to take any action required by any approved or
2 unmodified portion of the submission.

3 60. In the event that a resubmitted plan, report, or other
4 item, or portion thereof, is disapproved by EPA, EPA may again
5 require Asarco to correct the deficiencies, in accordance with
6 the preceding Paragraphs. EPA also retains the right to amend or
7 develop the plan, report, or other item. Subject only to
8 Asarco's right to invoke procedures set forth in Section XX
9 (Dispute Resolution), Asarco shall implement any such plan,
10 report, or item as amended or developed by EPA.

11 61. If, upon the first resubmission or upon any subsequent
12 resubmission, the plan, report, or item is disapproved by EPA due
13 to a material defect, Asarco shall be deemed to be in violation
14 of the provision of this Consent Decree requiring Asarco to
15 submit such plan, report, or item unless Asarco invokes the
16 dispute resolution procedures set forth in Section XX (Dispute
17 Resolution) and EPA's decision is reversed pursuant to that
18 Section. The provisions of Section XX (Dispute Resolution) and
19 Section XXI (Stipulated Penalties) shall govern the
20 implementation of the Work and accrual and payment of any
21 stipulated penalties during Dispute Resolution. Implementation
22 of any non-deficient portion of a submission shall not relieve
23 Asarco of any liability for stipulated penalties under Section
24 XXI (Stipulated Penalties).

1 62. All plans and other items containing activities to be
2 performed by Asarco that are required to be submitted to EPA
3 under this Consent Decree shall, upon approval by EPA, be deemed
4 to be incorporated in and an enforceable part of this Consent
5 Decree. In the event EPA approves a portion of a plan or other
6 item required to be submitted to EPA under this Consent Decree,
7 the approved portion shall be deemed to be incorporated in and an
8 enforceable part of this Consent Decree.

9
10 XIII. PROJECT COORDINATORS

11 63. Within twenty (20) days of entry of this Consent
12 Decree, Asarco and EPA will notify each other, in writing, of the
13 name, address, and telephone number of their respective
14 designated Project Coordinators and Alternate Project
15 Coordinators. If a Project Coordinator or Alternate Project
16 Coordinator initially designated is changed, the identity of the
17 successor will be given to the other parties at least five (5)
18 working days before the changes occur, unless impracticable, but
19 in no event later than the actual day the change is made.
20 Asarco's Project Coordinator shall be subject to disapproval by
21 EPA, which disapproval shall not be unreasonably invoked, and
22 shall have the technical expertise sufficient to adequately
23 oversee all aspects of the Work. Asarco's Project Coordinator
24 may assign other representatives, including other contractors, to

1 serve as a Site representative for oversight of performance of
2 daily operations during remedial activities.

3 64. Plaintiff may designate other representatives,
4 including, but not limited to, EPA employees, and federal
5 contractors and consultants, to observe and monitor the progress
6 of any activity undertaken pursuant to this Consent Decree.
7 EPA's Project Coordinator and Alternate Project Coordinator shall
8 have the authority lawfully vested in a Remedial Project Manager
9 (RPM) by the NCP. In addition, EPA's Project Coordinator or
10 Alternate Project Coordinator shall have authority, consistent
11 with the NCP, to halt any Work required by this Consent Decree
12 and to take any necessary response action when s/he determines
13 that conditions at the Site constitute an emergency situation or
14 may present an immediate threat to public health or welfare or
15 the environment due to the release or threatened release of
16 hazardous substances, pollutants or contaminants.

17
18 XIV. ASSURANCE OF ABILITY TO COMPLETE WORK

19 65. Within thirty (30) days of entry of this Consent
20 Decree, Asarco shall establish and maintain sufficient financial
21 assurance for performance of the Work in one of the following
22 forms:

23 (A) A surety bond guaranteeing performance of the Work.

1 (B) One or more letters of credit equalling the total
2 estimated cost of the Work.

3 (C) A trust fund.

4 (D) A guarantee to perform the Work by one or more parent
5 corporations or subsidiaries, or by one or more
6 unrelated corporations that have a substantial business
7 relationship with Asarco.

8 (E) A demonstration that Asarco satisfies the financial
9 test specified in 40 C.F.R. § 264.143(f).

10 66. If Asarco seeks to demonstrate the ability to complete
11 the Work through a guarantee by a third party pursuant to
12 Paragraph 65(D) of this Consent Decree, Asarco shall demonstrate
13 that the guarantor satisfies the requirements of 40 C.F.R.
14 § 264.143(f). If Asarco seeks to demonstrate its ability to
15 complete the Work by means of the financial test or the corporate
16 guarantee, it shall resubmit sworn statements conveying the
17 information required by 40 C.F.R. § 264.143(f) annually, on the
18 anniversary of the effective date of this Consent Decree. In the
19 event that EPA determines at any time that Asarco has not met the
20 financial test specified in 40 C.F.R. § 264.143(f) or one of the
21 other methods of financial assurance set forth in Paragraph 65,
22 such determination being subject to Section XX (Dispute
23 Resolution), Asarco shall, within thirty (30) days of receipt of
24 notice of EPA's determination, unless such determination is
25

1 stayed by this Court, obtain and present to EPA for approval one
2 of the other forms of financial assurance listed in Paragraph 65
3 of this Consent Decree. Asarco's inability to demonstrate
4 financial ability to complete the Work shall not excuse
5 performance of any activities required under this Consent Decree.
6

7 XV. CERTIFICATION OF COMPLETION

8 A. Completion of the Remedial Action

9 67. Within ninety (90) days after Asarco concludes that the
10 Remedial Action has been fully performed, Asarco shall so notify
11 EPA and shall schedule and conduct a pre-certification inspection
12 to be attended by Asarco and EPA. If, after the pre-
13 certification inspection, Asarco still believes that the Remedial
14 Action has been fully performed, it shall submit a written report
15 to EPA for approval pursuant to Section XII (Submissions
16 Requiring EPA Approval) within thirty (30) days of the
17 inspection. In the report, Asarco's Project Coordinator shall
18 certify that the Remedial Action has been completed in full
19 satisfaction of the requirements of this Consent Decree. The
20 report shall contain the following statement, signed by a
21 responsible corporate official of Asarco or Asarco's Project
22 Coordinator:

1 "I certify that the information contained in or
2 accompanying this submission is true, accurate, and
3 complete."

4 If, after completion of the pre-certification inspection and
5 receipt and review of the written report, EPA determines that the
6 Remedial Action or any portion thereof has not been completed in
7 accordance with this Consent Decree, EPA will notify Asarco in
8 writing of the activities that must be undertaken to complete the
9 Remedial Action. EPA shall set forth in the notice a schedule
10 for performance of such activities consistent with the Consent
11 Decree and the SOW or require Asarco to submit a schedule to EPA
12 for approval pursuant to Section XII (Submissions Requiring EPA
13 Approval). Asarco shall perform all activities described in the
14 notice in accordance with the specifications and schedules
15 established pursuant to this Paragraph, subject to Asarco's right
16 to invoke the dispute resolution procedures set forth in Section
17 XX (Dispute Resolution).

18 68. If EPA concludes, based on the initial or any
19 subsequent Certification of Completion by Asarco, that the
20 Remedial Action has been fully performed in accordance with this
21 Consent Decree, EPA will so certify in writing to Asarco. This
22 certification shall constitute the Certification of Completion of
23 the Remedial Action for purposes of this Consent Decree,
24 including, but not limited to, Section XXII (Covenants Not to Sue
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1 by Plaintiff) and Section XXX (Termination of Consent Decree).
2 Certification of Completion of the Remedial Action shall not
3 affect Asarco's obligations under this Consent Decree that
4 continue beyond the Certification of Completion, including, but
5 not limited to, access, Operation and Maintenance, record
6 retention, indemnification, insurance, and payment of Future
7 Response Costs and penalties.

8
9 B. Completion of the Work

10 69. Within ninety (90) days after Asarco concludes that all
11 phases of the Work (including O & M), have been fully performed,
12 Asarco shall so certify to EPA by submitting a written report
13 certifying that the Work has been completed in full satisfaction
14 of the requirements of this Consent Decree. The report shall
15 contain the following statement, signed by a responsible
16 corporate official of Asarco or Asarco's Project Coordinator:

17 "I certify that the information contained in or
18 accompanying this submission is true, accurate, and
19 complete."

20 If, after review of the written report, EPA determines that any
21 portion of the Work has not been completed in accordance with
22 this Consent Decree, EPA will notify Asarco in writing of the
23 activities that must be undertaken to complete the Work. EPA
24 will set forth in the notice a schedule for performance of such
25

1 activities consistent with the Consent Decree and the SOW or
2 require Asarco to submit a schedule to EPA for approval pursuant
3 to Section XII (Submissions Requiring EPA Approval). Asarco
4 shall perform all activities described in the notice in
5 accordance with the specifications and schedules established
6 therein, subject to Asarco's right to invoke the dispute
7 resolution procedures set forth in Section XX (Dispute
8 Resolution).

9 70. If EPA concludes, based on the initial or any
10 subsequent Certification of Completion by Asarco, that the Work
11 has been fully performed in accordance with this Consent Decree,
12 EPA will so notify Asarco in writing.

13
14 XVI. EMERGENCY RESPONSE

15 71. In the event of any action or occurrence during the
16 performance of the Work which causes or threatens a release of a
17 hazardous substance, pollutant or contaminant that constitutes an
18 emergency situation or may present an immediate threat to public
19 health or welfare or the environment, Asarco shall, subject to
20 Paragraph 72, immediately take all appropriate action to prevent,
21 abate, or minimize such release or threat of release, and shall
22 immediately notify EPA's Project Coordinator, or, if the Project
23 Coordinator is unavailable, EPA's Alternate Project Coordinator.
24 If neither of these persons is available, Asarco shall notify the
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1 EPA Response/Investigations Section, EPA Region 10. Asarco
2 shall take such actions in consultation with EPA's Project
3 Coordinator or other available authorized EPA officer and in
4 accordance with all applicable provisions of the Health and
5 Safety Plans, the Contingency Plans, and any other applicable
6 plans or documents developed pursuant to the SOW. In the event
7 that Asarco fails to take appropriate response action as required
8 by this Section, and EPA takes such action instead, Asarco shall
9 reimburse EPA all costs of the response action not inconsistent
10 with the NCP pursuant to Section XVII (Reimbursement of Response
11 Costs).

12 72. Nothing in the preceding Paragraph or in this Consent
13 Decree shall be deemed to limit any authority of the United
14 States to take, direct, or order all appropriate action or to
15 seek an order from the Court to protect human health and the
16 environment or to prevent, abate, respond to, or minimize an
17 actual or threatened release of a hazardous substance, pollutant
18 or contaminant on, at, or from the Site.

19
20 XVII. REIMBURSEMENT OF RESPONSE COSTS

21 73. Within thirty (30) days of the effective date of this
22 Consent Decree, Asarco shall pay to the United States three
23 hundred and thirty-three thousand and five hundred dollars
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1 (\$333,500) in the form of a certified check or checks made
2 payable to "EPA Hazardous Substance Superfund," and
3 referencing CERCLA Number 1TGB10N658 and DOJ Case
4 No. 90-11-2-698 in partial reimbursement of Past Response Costs.
5 Asarco shall forward the certified check(s) to U.S. EPA
6 Superfund, P.O. Box 360903M, Pittsburgh, Pennsylvania 15251, and
7 shall send copies of the check to the U.S. Department of Justice
8 and EPA as specified in Section XXVII (Notices and Submissions).
9 Pursuant to CERCLA § 107(a), interest shall accrue on the unpaid
10 balance of Past Response Costs from the date of the demand for
11 payment for such costs.

12 74. Asarco shall reimburse the United States for all Future
13 Response Costs not inconsistent with the National Contingency
14 Plan incurred by the United States. EPA will send Asarco a
15 demand for payment of all response costs, together with a summary
16 accounting of the costs claimed, on a quarterly or annual basis
17 at EPA's discretion. The summary shall include: (A) the
18 Department of Justice's response costs, (B) EPA's payroll costs,
19 including the name and titles of the persons charging time to the
20 Site, the pay period, the number of hours and the applicable
21 salary and benefits for such person, (C) EPA's travel costs,
22 including the names of the persons charging such travel and the
23 applicable transportation, per diem and incidental costs, (D)
24 EPA's contract costs, including annual dollar amount and date(s)

1 paid, invoice numbers for such payments and a brief summary of
2 activities performed, and (E) EPA's indirect costs, including the
3 amount computed on the basis of direct labor hours. If Asarco
4 desires additional information, Asarco may request a copy of the
5 CDMS Report (or its equivalent) and EPA's standard cost
6 documentation package. Asarco shall make all payments within
7 thirty (30) days of Asarco's receipt of each demand for payment,
8 except as otherwise provided in Paragraph 75. Asarco shall make
9 all payments required by this Paragraph in the manner described
10 in Paragraph 73.

11 75. Asarco may contest payment of any Future Response Costs
12 under Paragraph 74 if it determines that the U.S. Department of
13 Justice or EPA has made an accounting error or if it alleges that
14 a cost item that is included represents costs that are
15 inconsistent with the NCP. Such objection shall be made in
16 writing within thirty (30) days of receipt of the demand for
17 payment and must be sent to EPA pursuant to Section XXVII
18 (Notices and Submissions). Any such objection shall specifically
19 identify the contested Future Response Costs and the basis for
20 objection. In the event of an objection, Asarco shall within the
21 thirty (30) day period pay all uncontested Future Response Costs
22 to the United States in the manner described in Paragraph 73.
23 Simultaneously, Asarco shall establish an interest bearing escrow
24 account in a bank duly chartered in the State of Washington and
25

1 remit to that escrow account funds equivalent to the amount of
2 the contested Future Response Costs. Asarco shall send to the
3 U.S. Department of Justice and EPA, as provided in Section XXVII
4 (Notices and Submissions), a copy of the transmittal letter and
5 check paying the uncontested Future Response Costs, and a copy of
6 the correspondence that establishes and funds the escrow account,
7 including, but not limited to, information containing the
8 identity of the bank and bank account under which the escrow
9 account is established as well as a bank statement showing the
10 initial balance of the escrow account. Simultaneously with
11 establishment of the escrow account, Asarco shall initiate the
12 Dispute Resolution procedures in Section XX (Dispute Resolution).
13 If the United States prevails in the dispute, within five (5)
14 days of the resolution of the dispute, Asarco shall direct the
15 escrow holder to remit the escrowed monies (with accrued
16 interest) to the United States in the manner described in
17 Paragraph 73. If Asarco prevails concerning any aspect of the
18 contested costs, Asarco shall direct the escrow holder to remit
19 payment for that portion of the costs (plus associated accrued
20 interest) for which it did not prevail to the United States in
21 the manner described in Paragraph 73; Asarco shall be disbursed
22 the balance of the escrow account. The dispute resolution
23 procedures set forth in this Paragraph in conjunction with the
24 procedures set forth in Section XX (Dispute Resolution) shall be

1 the exclusive mechanisms for resolving disputes regarding
2 Asarco's obligation to reimburse the United States for its Future
3 Response Costs.

4 76. In the event that the payments required by Paragraph 73
5 are not made within thirty (30) days of the effective date of
6 this Consent Decree or the payments required by Paragraph 74 are
7 not made within thirty (30) days of Asarco's receipt of the bill,
8 Asarco shall pay interest on the unpaid balance at the rate
9 established pursuant to Section 107(a) of CERCLA, 42 U.S.C.

10 § 9607. The interest on Past Response Costs shall begin to
11 accrue thirty (30) days after the effective date of the Consent
12 Decree. The interest on Future Response Costs shall begin to
13 accrue thirty (30) days after Asarco's receipt of the demand for
14 payment. Payments made under this Paragraph shall be in addition
15 to such other remedies or sanctions available to Plaintiff by
16 virtue of Asarco's failure to make timely payments under this
17 Section.

18
19 XVIII. INDEMNIFICATION AND INSURANCE

20 77. The United States does not assume any liability by
21 entering into this Consent Decree or by virtue of any designation
22 of Asarco as EPA's authorized representative under Section 104(e)
23 of CERCLA. Asarco shall indemnify, save and hold harmless the
24 United States and its officials, agents, employees, contractors,
25

26 U.S. DEPARTMENT OF JUSTICE
27 Env't. Enforcement, P.O. Box 7611
28 Ben Franklin Station
Washington, D.C. 20044-7611
(202) 514-1491

CONSENT DECREE FOR INTERIM
REMEDIAL ACTION -- PAGE 49

1 subcontractors, or representatives for or from any and all claims
2 or causes of action arising from, or on account of, acts or
3 omissions of Asarco, its officers, directors, employees, agents,
4 contractors, subcontractors, and any persons acting on its behalf
5 or under its control, in carrying out activities pursuant to this
6 Consent Decree, including, but not limited to, any claims arising
7 from any designation of Asarco as EPA's authorized representative
8 under Section 104(e) of CERCLA. The United States shall not be
9 held out as a party to any contract entered into by or on behalf
10 of Asarco in carrying out activities pursuant to this Consent
11 Decree. Neither Asarco nor any such contractor shall be
12 considered an agent of the United States.

13 78. Asarco waives all claims against the United States for
14 damages or reimbursement or for set-off of any payments made or
15 to be made to the United States, arising from or on account of
16 any contract, agreement, or arrangement between Asarco and any
17 person for performance of Work on or relating to the Site,
18 including, but not limited to, claims on account of construction
19 delays. In addition, Asarco shall indemnify and hold harmless
20 the United States with respect to any and all claims for damages
21 or reimbursement arising from or on account of any contract,
22 agreement, or arrangement between Asarco and any person for
23 performance of Work on or relating to the Site, including, but
24 not limited to, claims on account of construction delays.

1 79. No later than fifteen (15) days after the effective
2 date of this Consent Decree, Asarco shall secure, and shall
3 maintain, until the first anniversary of EPA's Certification of
4 Completion of the Remedial Action pursuant to Paragraph 68 of
5 Section XV (Certification of Completion), comprehensive general
6 liability insurance with an annual aggregate amount of not less
7 than Ten Million Dollars (\$10,000,000) with the first Two Million
8 Dollars (\$2,000,000) self-insured by Asarco. In addition, Asarco
9 shall secure and shall maintain automobile liability insurance as
10 follows: Bodily injury liability -- Five Hundred Thousand
11 Dollars (\$500,000) each person, One Million Dollars (\$1,000,000)
12 each occurrence; Property damage liability -- Five Hundred
13 Thousand Dollars (\$500,000) each occurrence. All insurance
14 policies shall name the United States as an additional insured.
15 In addition, for the duration of this Consent Decree, Asarco
16 shall satisfy, or shall ensure that their contractors or
17 subcontractors satisfy, all applicable laws and regulations
18 regarding the provision of worker's compensation insurance for
19 all persons performing the Work on behalf of Asarco in
20 furtherance of this Consent Decree. Prior to commencement of the
21 Work under this Consent Decree, Asarco shall provide to EPA
22 certificates of such insurance and a copy of each insurance
23 policy. Asarco shall resubmit such certificates and copies of
24 policies each year on the anniversary of the effective date of
25

1 this Consent Decree. If Asarco demonstrates by evidence
2 satisfactory to EPA that any contractor or subcontractor
3 maintains insurance equivalent to that described above, or
4 insurance covering the same risks but in a lesser amount, then,
5 with respect to that contractor or subcontractor, Asarco need
6 provide only that portion of the insurance described above which
7 is not maintained by the contractor or subcontractor.

8
9 XIX. FORCE MAJEURE

10 80. "Force Majeure," for purposes of this Consent Decree,
11 is defined as any event arising from causes beyond the control of
12 Asarco or of any entity controlled by Asarco, including, but not
13 limited to, its contractors and subcontractors, that delays or
14 prevents the performance of any obligation under this Consent
15 Decree despite Asarco's best efforts to fulfill the obligation.
16 The requirement that Asarco exercise "best efforts to fulfill the
17 obligation" includes using best efforts to anticipate any
18 potential "Force Majeure" event and best efforts to address the
19 effects of any potential "Force Majeure" event: (A) as it is
20 occurring and (B) following the "Force Majeure" event, such that
21 the delay is minimized to the greatest extent possible. "Force
22 Majeure" does not include financial inability to complete the
23 Work.

1 81. If any event occurs or has occurred that may delay the
2 performance of any obligation under this Consent Decree, whether
3 or not caused by a "Force Majeure" event, Asarco shall
4 immediately notify EPA's Project Coordinator or, in his or her
5 absence, EPA's Alternate Project Coordinator or, in the event
6 both of EPA's designated representatives are unavailable, the
7 Director of the Hazardous Waste Management Division, EPA Region
8 10, within forty-eight (48) hours of when Asarco first knew or
9 should have known that the event might cause a delay. Within
10 five days thereafter, Asarco shall provide in writing to EPA the
11 reasons for the delay; the anticipated duration of the delay; all
12 actions taken or to be taken to prevent or minimize the delay; a
13 schedule for implementation of any measures to be taken to
14 prevent or mitigate the delay or the effect of the delay;
15 Asarco's rationale for attributing such delay to a "Force
16 Majeure" event if it intends to assert such a claim; and a
17 statement as to whether, in the opinion of Asarco, such event may
18 cause or contribute to an endangerment to public health, welfare,
19 or the environment. Asarco shall include with any such notice
20 all available documentation supporting its claim that the delay
21 was attributable to a "Force Majeure" event. Failure to comply
22 with the above requirements shall preclude Asarco from asserting
23 any claim of "Force Majeure" for that event. Asarco shall be

1 deemed to have notice of any circumstance of which its
2 contractors or subcontractors had or should have had notice.

3 82. If EPA agrees that the delay or anticipated delay is
4 attributable to a "Force Majeure" event, the time for performance
5 of the obligations under this Consent Decree that are affected by
6 the "Force Majeure" event will be extended by EPA for such time
7 as is necessary to complete those obligations. An extension of
8 the time for performance of the obligations affected by the
9 "Force Majeure" event shall not, of itself, extend the time for
10 performance of any subsequent obligation that is not affected by
11 the "Force Majeure" event. If EPA does not agree that the delay
12 or anticipated delay has been or will be caused by a "Force
13 Majeure" event, EPA will notify Asarco in writing of its
14 decision. If EPA agrees that the delay is attributable to a
15 "Force Majeure" event, EPA will notify Asarco of the length of
16 the extension, if any, for performance of the obligations
17 affected by the "Force Majeure" event.

18 83. If Asarco elects to invoke the dispute resolution
19 procedures set forth in Section XX (Dispute Resolution), it shall
20 do so no later than fifteen (15) days after receipt of EPA's
21 notice. In any such proceeding, Asarco shall have the burden of
22 demonstrating by a preponderance of the evidence that the delay
23 or anticipated delay has been or will be caused by a "Force
24 Majeure" event, that the duration of the delay or the extension
25

1 sought was or will be warranted under the circumstances, that
2 best efforts were exercised to avoid and mitigate the effects of
3 the delay, and that Asarco complied with the requirements of
4 Paragraphs 80 and 81, above. If Asarco carries this burden, the
5 delay at issue shall be deemed to have been caused by a "Force
6 Majeure" event.

7
8 XX. DISPUTE RESOLUTION

9 84. Unless otherwise expressly provided for in this Consent
10 Decree, the dispute resolution procedures of this Section shall
11 be the exclusive mechanism to resolve disputes arising under or
12 with respect to this Consent Decree and shall apply to all
13 provisions of this Consent Decree. However, the procedures set
14 forth in this Section shall not apply to actions by the United
15 States to enforce obligations of Asarco that have not been
16 disputed in accordance with this Section.

17 85. Any dispute which arises under or with respect to this
18 Consent Decree shall in the first instance be the subject of
19 informal negotiations between the parties to the dispute. The
20 period for informal negotiations shall not exceed twenty (20)
21 days from the time the dispute arises, unless it is modified by
22 agreement of the parties to the dispute. The dispute shall be
23 considered to have arisen when one party notifies the other
24 parties in writing that there is a dispute.

1 86. In the event that the parties cannot resolve a dispute
2 by informal negotiations under the preceding Paragraph, then the
3 position advanced by EPA shall be considered binding unless,
4 within ten (10) days after written notice from EPA that the
5 informal negotiation period has ended, Asarco invokes the formal
6 dispute resolution procedures of this Section by serving on the
7 United States a written statement of position on the matter in
8 dispute, including, but not limited to, any factual data,
9 analysis, or opinion supporting that position and any supporting
10 documentation relied upon by Asarco.

11 87. Formal dispute resolution for disputes pertaining to
12 the selection or adequacy of any response action and all other
13 disputes that are accorded review on the administrative record
14 under applicable principles of administrative law shall be
15 conducted pursuant to the procedures set forth in this Paragraph
16 and § 113(j) of CERCLA, 42 U.S.C. § 9613(j). For purposes of
17 this Paragraph, the adequacy of any response action includes,
18 without limitation: (i) the adequacy or appropriateness of plans,
19 procedures to implement plans, or any other items requiring
20 approval by EPA under this Consent Decree; and (ii) the adequacy
21 of response actions performed pursuant to this Consent Decree.
22 Nothing in this Consent Decree shall be construed to allow any
23 dispute by Asarco regarding the validity of the ROD's provisions.

- 1 (A) An administrative record of the dispute shall be
2 maintained by EPA and shall contain all statements of
3 position with regard to the dispute, including
4 supporting documentation, submitted pursuant to this
5 Paragraph and Paragraph 86.
- 6 (B) Within fourteen (14) days after receipt of Asarco's
7 statement of position submitted pursuant to Paragraph
8 86, EPA will serve on Asarco its statement of position,
9 including, but not limited to, any factual data,
10 analysis, or opinion supporting that position and all
11 supporting documentation relied upon by EPA, in
12 response to Asarco's statement of position. Within
13 five (5) days after receipt of EPA's responsive
14 submission, Asarco may submit a supplemental or reply
15 statement of position.
- 16 (C) The Director of the Waste Management Division, EPA
17 Region 10, will then issue a final administrative
18 decision resolving the dispute based on the
19 administrative record described in Paragraph 87(A).
20 This decision shall be binding upon Asarco, subject
21 only to the right to seek judicial review pursuant to
22 Paragraphs 87(D) and (E).
- 23 (D) Any administrative decision by EPA pursuant to
24 Paragraph 87(C) shall be reviewable by this Court,
25

1 provided that a notice of judicial appeal is filed by
2 Asarco with the Court and served on all Parties within
3 ten (10) days of receipt of EPA's decision. The notice
4 of judicial appeal shall include a description of the
5 matter in dispute, the efforts made by the Parties to
6 resolve it, the relief requested, and the schedule, if
7 any, within which the dispute must be resolved to
8 ensure orderly implementation of this Consent Decree.
9 The United States may file a response to Asarco's
10 notice of judicial appeal.

11 (E) In proceedings on any dispute governed by this
12 Paragraph, Asarco shall have the burden of
13 demonstrating that the decision of the Waste Management
14 Division Director is arbitrary and capricious or
15 otherwise not in accordance with law. In accordance
16 with § 113 of CERCLA, 42 U.S.C. § 9613, judicial review
17 of EPA's decision shall be on the administrative record
18 compiled pursuant to Paragraphs 87(A) and (B).

19 88. Formal dispute resolution for disputes that neither
20 pertain to the selection or adequacy of any response action nor
21 are otherwise accorded review on the administrative record under
22 applicable principles of administrative law, shall be governed by
23 this Paragraph.

1 (A) Following receipt of Asarco's statement of position
2 submitted pursuant to Paragraph 86, the EPA Region 10
3 Waste Management Division Director will issue a final
4 decision resolving the dispute. The Waste Management
5 Division Director's decision shall be binding on Asarco
6 unless, within ten (10) days of receipt of the
7 decision, Asarco files with the Court and serves on all
8 Parties a notice of judicial appeal setting forth the
9 matter in dispute, the efforts made by the Parties to
10 resolve it, the relief requested, and the schedule, if
11 any, within which the dispute must be resolved to
12 ensure orderly implementation of the Consent Decree.
13 The United States may file a response to Asarco's
14 notice of judicial appeal.

15 (B) Notwithstanding Paragraph 12 of Section I (Background)
16 of this Consent Decree, judicial review of any dispute
17 governed by this Paragraph shall be governed by
18 applicable provisions of law.

19 89. The invocation of formal dispute resolution procedures
20 under this Section shall not of itself extend, postpone, or
21 affect in any way any obligation of Asarco under this Consent
22 Decree, unless EPA finds or this Court orders otherwise, except
23 that payment of stipulated penalties with respect to the disputed
24 matter shall be stayed pending resolution of the dispute as
25

1 provided in Paragraph 97. Notwithstanding the stay of payment,
2 stipulated penalties shall accrue from the first day of
3 noncompliance with any applicable provision of this Consent
4 Decree. In the event that Asarco does not prevail on the
5 disputed issue, stipulated penalties shall be assessed and paid
6 as provided in Section XXI (Stipulated Penalties).

8 XXI. STIPULATED PENALTIES

9 90. Asarco shall be liable for stipulated penalties in the
10 amounts set forth in Paragraphs 91 and 92 to the United States
11 for failure to comply with the requirements of this Consent
12 Decree specified below, unless excused under Section XIX ("Force
13 Majeure"). "Compliance" by Asarco shall include completion of
14 the activities under this Consent Decree or any Work Plan or
15 other plan approved under this Consent Decree identified below in
16 accordance with all applicable requirements of law, this Consent
17 Decree, the SOW, and any plans or other documents approved by EPA
18 pursuant to this Consent Decree and within the specified time
19 schedules established by and approved under this Consent Decree.

20 91. For purposes of this Consent Decree, three tiers of
21 stipulated penalties shall apply:

22 (A) Tier I Noncompliance shall be defined as follows:

23 (1) Conducting the Work without EPA approval, or
24
25

1 (2) Failure to perform the Work in accordance with
2 requirements set forth in this Consent Decree and
3 Statement of Work.

4 (B) Tier II Noncompliance shall be defined as the failure
5 to submit on time each of the following documents or to
6 perform on time or adequately each of the following
7 activities:

8 (1) Submission of Management Strategy Plan within
9 thirty (30) days of entry of this Consent Decree.

10 (2) Submission of all other Work Plans within sixty
11 (60) days of entry of this Consent Decree.

12 (3) Submission of corrected or revised Work Plans in
13 accordance with Section XII (Submissions
14 Requiring EPA Approval).

15 (4) Initiation of remedial action activity within
16 seven (7) days after approval of the Work Plan
17 for that activity.

18 (5) Completion of remedial action activities in
19 accordance with schedules submitted in the
20 monthly reports required under Paragraph 51(D) of
21 this Consent Decree.

22 (C) Tier III Noncompliance shall be defined as the failure
23 to submit on time versions of each of the following
24
25

documents, or to perform on time the following activities:

- (1) Monthly progress reports.
- (2) Certification of insurance coverage.
- (3) Financial information.

92. Stipulated Penalties for the violations described in Paragraph 91 above shall accrue in the following amounts:

<u>Period of Failure to Comply</u>	<u>Penalty per Violation per Day</u>
------------------------------------	------------------------------------------

Tier I Noncompliance:

1st through 30th Day	\$5,000
31st through 60th Day	\$10,000
61st Day and beyond	\$15,000

Tier II Noncompliance:

1st through 30th Day	\$3,000
31st through 60th Day	\$6,000
61st Day and beyond	\$12,000

Tier III Noncompliance:

1st through 30th Day	\$500
31st through 60th Day	\$1,000
61st Day and beyond	\$2,500

The United States may, in its discretion, not subject to dispute resolution or judicial review, waive or suspend the accrual or payment of any stipulated penalties due to it under this Paragraph.

93. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the

1 correction of the noncompliance or completion of the activity.

2 Nothing herein shall prevent the simultaneous accrual of separate
3 penalties for separate violations of this Consent Decree.

4 94. Following a determination by EPA that Asarco has failed
5 to comply with any requirement of this Consent Decree, EPA shall
6 give Asarco written notification of the violation and describe
7 the noncompliance. EPA shall use best efforts to issue such
8 notification within ten (10) days of its determination of a
9 violation; provided, however, that penalties shall accrue as
10 provided in the preceding paragraph regardless of whether EPA has
11 notified Asarco of a violation. EPA's notice shall also indicate
12 the amount of penalties currently due and the rate of accrual for
13 continuing violations.

14 95. All penalties owed to the United States under this
15 section shall be due and payable within thirty (30) days of
16 Asarco's receipt from EPA of a demand for payment of the
17 penalties, unless Asarco invokes the Dispute Resolution
18 procedures under Section XX (Dispute Resolution). All payments
19 under this Section shall be paid by certified check made payable
20 to "EPA Hazardous Substances Superfund," shall be mailed to U.S.
21 EPA Superfund, P.O. Box 360903M, Pittsburgh, Pennsylvania 15251,
22 and shall reference CERCLA Number TFA10NPL6 and DOJ Case Number
23 90-11-2-698. Copies of check(s) paid pursuant to this Section,
24 and any accompanying transmittal letter(s), shall be sent to the
25

1 U.S. Department of Justice and EPA as provided in Section XXVII
2 (Notices and Submissions).

3 96. Neither the invocation of dispute resolution procedures
4 under Section XX (Dispute Resolution) nor the payment of
5 penalties shall alter in any way Asarco's obligation to complete
6 the performance of the Work required under this Consent Decree.

7 97. Penalties shall continue to accrue as provided in
8 Paragraph 93 during any dispute resolution period, but need not
9 be paid until the following:

10 (A) If the dispute is resolved by agreement or by a
11 decision of EPA that is not appealed to this Court,
12 accrued penalties shall be paid to EPA within fifteen
13 (15) days of the agreement or the receipt of EPA's
14 decision or order.

15 (B) If the dispute is appealed to this Court and the United
16 States prevails in whole or in part, Asarco shall pay
17 all accrued penalties owed to EPA within sixty (60)
18 days of receipt of the Court's decision or order,
19 except as provided in Subparagraph C below.

20 (C) If the District Court's decision is appealed by any
21 Party, Asarco shall pay all accrued penalties into an
22 interest-bearing escrow account within sixty (60) days
23 of receipt of the Court's decision or order. Penalties
24 shall be paid into this account as they continue to
25

1 accrue, at least every sixty (60) days. Within fifteen
2 (15) days of receipt of the final appellate court
3 decision, the escrow agent shall pay the balance of the
4 account to the United States or to Asarco to the extent
5 that they prevail.

6 98. (A) If Asarco fails to pay stipulated penalties when
7 due, the United States may institute proceedings to collect the
8 penalties, as well as late charges and interest. Asarco shall
9 pay interest on the unpaid balance, which shall begin to accrue
10 at the end of the thirty-day period at the rate established
11 pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607.

12 (B) Nothing in this Section shall be construed as
13 prohibiting, altering, or in any way limiting the ability of the
14 United States to seek any other remedies or sanctions available
15 by virtue of Asarco's violation of this Decree or of the statutes
16 and regulations upon which it is based, including, but not
17 limited to, penalties pursuant to Section 122(1) of CERCLA.

18 (C) No payments made under this Section shall be tax
19 deductible for federal tax purposes.

20
21 XXII. COVENANTS NOT TO SUE BY PLAINTIFF

22 99. In consideration of the actions that will be performed
23 and the payments that will be made by Asarco under the terms of
24 the Consent Decree, and except as specifically provided in
25

1 Paragraphs 100, 101, and 103 of this Section, the United States
2 covenants not to sue or to take administrative action against
3 Asarco pursuant to Sections 106 and 107(a) of CERCLA and Section
4 7003 of RCRA for performance of the Work and for recovery of Past
5 Response Costs and Future Response Costs that are actually paid
6 to the United States pursuant to Paragraphs 73 and 74 of Section
7 XVII (Reimbursement of Response Costs). These covenants not to
8 sue are limited to and shall take effect upon the receipt by EPA
9 of the payments required by Paragraphs 73 and 74 of Section XVII
10 (Reimbursement of Response Costs). These covenants not to sue
11 are conditioned upon the complete and satisfactory performance by
12 Asarco of its obligations under this Consent Decree. These
13 covenants not to sue extend only to Asarco and do not extend to
14 any other person.

15 100. United States' Pre-Certification Reservations.

16 Notwithstanding any other provision of this Consent Decree, the
17 United States reserves, and this Consent Decree is without
18 prejudice to, the right to institute proceedings in this action
19 or in a new action, or to issue an administrative order seeking
20 to compel Asarco: (i) to perform further response actions
21 relating to the Site or (ii) to reimburse the United States for
22 additional costs of response if, prior to Certification of
23 Completion of the Remedial Action:

1 (A) Conditions at the Site relating to those areas of the
2 Site addressed by the Work, previously unknown to the
3 United States, are discovered after the entry of this
4 Consent Decree; or

5 (B) Information relating to those areas of the Site
6 addressed by the Work is received, in whole or in part,
7 after the entry of this Consent Decree;

8 and these previously unknown conditions or this information
9 together with any other relevant information indicates that the
10 Remedial Action is not protective of human health or the
11 environment.

12 101. United States' Post-Certification Reservations.

13 Notwithstanding any other provision of this Consent Decree, the
14 United States reserves, and this Consent Decree is without
15 prejudice to, the right to institute proceedings in this action
16 or in a new action, or to issue an administrative order seeking
17 to compel Asarco: (i) to perform further response actions
18 relating to the Site or (ii) to reimburse the United States for
19 additional costs of response if, subsequent to Certification of
20 Completion of the Remedial Action:

21 (A) Conditions at the Site relating to those areas of the
22 Site addressed by the Work, previously unknown to the
23 United States, are discovered after the certification
24 of completion, or

1 (B) Information relating to those areas of the Site
2 addressed by the Work is received, in whole or in part,
3 after the certification of completion,
4 and these previously unknown conditions or this information
5 together with other relevant information indicate that the
6 Remedial Action is not protective of human health or the
7 environment.

8 102. For purposes of Paragraph 100, the information
9 previously received by and the conditions known to the United
10 States shall include only that information and those conditions
11 set forth in the Record of Decision for the Site, the
12 administrative record supporting the Record of Decision, and the
13 administrative record supporting CB N/T Operable Units 01, 02,
14 04, 05, 06, and 07. For purposes of Paragraph 101, the
15 information previously received by and the conditions known to
16 the United States shall include only that information and those
17 conditions set forth in the Record of Decision, the
18 administrative record supporting the Record of Decision, the
19 administrative record supporting CB N/T Operable Units 01, 02,
20 04, 05, 06, and 07, and any information received by the United
21 States pursuant to the requirements of this Consent Decree prior
22 to Certification of Completion of the Remedial Action.

23 103. General reservations of rights. The covenants not to
24 sue set forth above do not pertain to any matters other than
25

1 those expressly specified in Paragraph 99. The United States
2 reserves, and this Consent Decree is without prejudice to, all
3 rights against Asarco with respect to all other matters,
4 including but not limited to, the following:

5 (A) Subject to Paragraph 84 of this Consent Decree, claims
6 based on a failure by Asarco to meet a requirement of
7 this Consent Decree.

8 (B) Liability arising from the past, present, or future
9 disposal, release, or threat of release of hazardous
10 substances, pollutants or contaminants outside of the
11 Site.

12 (C) Liability for damages for injury to, destruction of, or
13 loss of natural resources.

14 (D) Liability for response costs that have been or may be
15 incurred by the Natural Resource Trustees identified in
16 Paragraph 4.

17 (E) Criminal liability.

18 (F) Liability for violations of federal or state law which
19 occur during or after implementation of the Remedial
20 Action.

21 (G) Liability for additional operable units at the Site or
22 the final response action.

23 (H) Liability for future releases at the Site attributable
24 to Asarco.

1 104. If Asarco fails to implement the Work under this
2 Consent Decree, EPA shall provide written notice to Asarco of
3 such failure. Asarco may invoke the procedures set forth in
4 Section XX (Dispute Resolution) to dispute EPA's determination
5 that Asarco failed to implement the Work in an adequate or timely
6 manner. Consistent with this Consent Decree, EPA may require
7 Asarco to perform, or EPA may perform, any or all portions of
8 Work necessary to correct a failure to perform the Work. EPA
9 reserves its rights under Section XXI (Stipulated Penalties) to
10 assess stipulated penalties. Costs incurred by the United States
11 in performing the Work pursuant to this Paragraph shall be
12 considered Future Response Costs that Asarco shall pay pursuant
13 to Section XVII (Reimbursement of Response Costs).

14 105. Notwithstanding any other provision of this Consent
15 Decree, the United States retains all authority and reserves all
16 rights to take any and all response actions authorized by law.

17
18 XXIII. COVENANTS BY ASARCO

19 106. Asarco hereby covenants not to sue and agrees not to
20 assert any claims or causes of action against the United States
21 with respect to the Work or this Consent Decree, including, but
22 not limited to, any direct or indirect claim for reimbursement
23 from the Hazardous Substance Superfund (established pursuant to
24 the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA

1 Sections 106(b)(2), 111 or 112, or any other provision of law, or
2 any claims arising out of response activities at the Site
3 pursuant to this Consent Decree. However, Asarco reserves, and
4 this Consent Decree is without prejudice to, actions against the
5 United States based on negligent actions taken directly by the
6 United States (not including oversight of or approval of Asarco's
7 plans or activities) that are brought pursuant to any statute
8 other than CERCLA and for which the waiver of sovereign immunity
9 is found in a statute other than CERCLA. Nothing in this
10 Consent Decree shall be deemed to constitute preauthorization of
11 a claim within the meaning of Section 111 of CERCLA, 42 U.S.C.
12 § 9611, or 40 C.F.R. § 300.700(d).

13
14 XIV. EFFECT OF SETTLEMENT

15 107. Nothing in this Consent Decree shall be construed to
16 create any rights in, or grant any cause of action to, any person
17 not a party to this Consent Decree. The preceding sentence shall
18 not be construed to waive or nullify any rights that any person
19 not a signatory to this Consent Decree may have under applicable
20 law. Each of the Settling Parties expressly reserves any and all
21 rights (including, but not limited to, any right to
22 contribution), defenses, claims, demands, and causes of action
23 which each party may have with respect to any matter,
24
25

1 transaction, or occurrence relating in any way to the Site
2 against any person not a party hereto.

3 108. Asarco agrees that with respect to any suit or claim
4 for contribution brought by it for matters related to this
5 Consent Decree it will notify the United States in writing no
6 later than sixty (60) days prior to the initiation of such suit
7 or claim. Asarco also agrees that with respect to any suit or
8 claim for contribution brought against it for matters related to
9 this Consent Decree they will notify in writing the United States
10 within twenty (20) days of service of the complaint on them.

11 109. In any subsequent administrative or judicial
12 proceeding initiated by the United States for injunctive relief,
13 recovery of response costs, or other appropriate relief relating
14 to the Site, Asarco shall not assert, and may not maintain, any
15 defense or claim based upon the principles of waiver, res
16 judicata, collateral estoppel, issue preclusion, claim-splitting,
17 or other defenses based upon any contention that the claims
18 raised by the United States in the subsequent proceeding were or
19 should have been brought in the instant case; provided, however,
20 that nothing in this Paragraph affects the enforceability of the
21 covenants not to sue set forth in Section XXII (Covenants Not to
22 Sue by Plaintiff).

XXV. ACCESS TO INFORMATION

110. Subject to the provisions of Paragraph 112 below, Asarco shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities regarding the Work or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information. Subject to Paragraphs 111 and 112, Asarco shall also make available to EPA for purposes of investigation, information gathering, or testimony relating to the Work or implementation of this Consent Decree, employees, agents or representatives employed by Asarco or its agents or representatives at the time of the request who have knowledge of relevant facts concerning the performance of the Work or implementation of the Consent Decree.

111. Asarco may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim

1 of confidentiality accompanies documents or information when they
2 are submitted to EPA, or if EPA has notified Asarco that the
3 documents or information are not confidential under the standards
4 of Section 104(e)(7) of CERCLA, the public may be given access to
5 such documents or information without further notice to Asarco.

6 112. Asarco may assert that certain documents, records, and
7 other information are privileged under the attorney-client
8 privilege or any other privilege recognized by federal law. If
9 Asarco asserts such a privilege, it shall provide EPA with the
10 following:

- 11 (A) The title of the document, record, or information.
- 12 (B) The date of the document, record, or information.
- 13 (C) The name and title of the author of the document,
14 record, or information.
- 15 (D) The name and title of each addressee and recipient.
- 16 (E) A description of the contents of the document, record,
17 or information.
- 18 (F) The privilege asserted by Asarco.

19 However, no documents, reports, or other information created or
20 generated pursuant to the requirements of the Consent Decree
21 shall be withheld on the grounds that they are privileged.

22 113. No claim of confidentiality shall be made with respect
23 to any data, including, but not limited to, all sampling,
24 analytical, monitoring, hydrogeologic, scientific, chemical, or
25

1 engineering data, or any other documents or information related
2 to conditions at the Site addressed by the Work.

4 XXVI. RETENTION OF RECORDS

5 114. Until ten (10) years after Asarco's receipt of EPA's
6 notification pursuant to Paragraph 70 of Section XV
7 (Certification of Completion), Asarco shall preserve and retain
8 all records and documents that come into its possession or
9 control that relate in any manner to conditions at the Site
10 addressed by the Work, to response actions to be conducted at the
11 Site, or that relate substantially to the liability of any person
12 for a release or threat of release at the Site, regardless of any
13 corporate retention policy to the contrary. Until ten (10) years
14 after Asarco's receipt of EPA's notification pursuant to
15 Paragraph 70 of Section XV (Certification of Completion), Asarco
16 shall also instruct its contractors and agents to preserve all
17 documents, records, and information of whatever kind, nature, or
18 description relating to the performance of the Work. Asarco need
19 not retain all records and documents now in its possession or
20 control that relate to conditions at the Site, response actions
21 conducted at the Site, or the liability of any person for a
22 release or threat of release at the Site, but shall first provide
23 EPA an opportunity to review such documents prior to their
24 destruction or removal from the Site.

1 115. At the conclusion of this document retention period,
2 Asarco shall notify EPA at least ninety (90) days prior to the
3 destruction of any such records or documents, and, upon request
4 by EPA, Asarco shall deliver any such records or documents to
5 EPA. Asarco may assert that certain documents, records, and
6 other information are privileged under the attorney-client
7 privilege or any other privilege recognized by federal law. If
8 Asarco asserts such a privilege, it shall provide EPA with the
9 following:

- 10 (A) The title of the document, record, or information.
11 (B) The date of the document, record, or information.
12 (C) The name and title of the author of the document,
13 record, or information.
14 (D) The name and title of each addressee and recipient.
15 (E) A description of the subject of the document, record,
16 or information.
17 (F) The privilege asserted by Asarco.

18 However, no documents, reports or other information created or
19 generated pursuant to the requirements of the Consent Decree
20 shall be withheld on the grounds that they are privileged.

21 116. Asarco hereby certifies that it has fully complied
22 with any and all EPA requests for information pursuant to Section
23 104(e) and 122(e) of CERCLA and Section 3007 of RCRA.

XXVII. NOTICES AND SUBMISSIONS

117. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, Asarco, and the state of Washington, respectively.

As to the U.S. Department of Justice:

One copy to:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

Re: DOJ Case No. 90-11-2-698.

As to EPA:

Four copies to:

Margaret Justus
EPA Project Coordinator
Hazardous Waste Division (HW-113)
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

U.S. DEPARTMENT OF JUSTICE
Env't. Enforcement, P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 514-1491

One copy to:

Tod Gold, Assistant Regional Counsel
Office of Regional Counsel (SO-125)
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

As to Asarco:

Thomas L. Aldrich
Site Manager
ASARCO Incorporated
North 51st and Baltimore Streets
(P.O. Box 1677)
Tacoma, WA 98402

Michael R. Thorp
Heller, Ehrman, White & McAuliffe
1400 First Interstate Plaza
1201 Pacific Avenue
Tacoma, WA 98402-4308

As to the state of Washington, one copy to:

Bruce Cochran
Department of Ecology
Hazardous Waste Investigations and Cleanup Program
Mail Stop PV-11
Olympia, Washington 98504-8711.

XXVIII. EFFECTIVE DATE

118. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

1 XXIX. RETENTION OF JURISDICTION

2 119. This Court retains jurisdiction over both the subject
3 matter of this Consent Decree and Asarco for the duration of the
4 performance of the terms and provisions of this Consent Decree
5 for the purpose of enabling any of the Parties to apply to the
6 Court at any time for such further order, direction, and relief
7 as may be necessary or appropriate for the construction or
8 modification of this Consent Decree, or to effectuate or enforce
9 compliance with its terms, or to resolve disputes in accordance
10 with Section XX (Dispute Resolution) hereof.

11
12 XXX. TERMINATION OF CONSENT DECREE

13 120. After approval by EPA of a Certification of Completion
14 in accordance with Paragraph 70, this Consent Decree shall be
15 terminated upon motion of either party and order of this Court.
16 Termination of this Consent Decree shall not affect the
17 requirements set forth in Section VIII (EPA Periodic Review),
18 Section XXII (Covenant Not To Sue by Plaintiff), Section XXIII
19 (Covenants by Asarco), Section XXIV (Effect of Settlement), and
20 Section XXVI (Retention of Records).

21
22 XXXI. APPENDICES

23 121. The following appendices are attached to and
24 incorporated into this Consent Decree:

25
26 U.S. DEPARTMENT OF JUSTICE
27 Env't. Enforcement, P.O. Box 7611
28 Ben Franklin Station
 Washington, D.C. 20044-7611
 (202) 514-1491
CONSENT DECREE FOR INTERIM
REMEDIAL ACTION -- PAGE 79

1 "Appendix A" is the ROD.

2 "Appendix B" is the SOW.

3 "Appendix C" is the description of the Site.

4
5 XXXII. COMMUNITY RELATIONS

6 122. Asarco shall propose to EPA its participation in the
7 Community Relations Plan to be developed by EPA. EPA will
8 determine the appropriate role for Asarco under the Plan. Asarco
9 shall also cooperate with EPA in providing information regarding
10 the Work to the public. As requested by EPA, Asarco shall
11 participate in the preparation of such information for
12 dissemination to the public and in public meetings which may be
13 held or sponsored by EPA to explain activities at or relating to
14 the Site. Nothing in this Paragraph shall be construed to
15 preclude Asarco from conducting its own community relations
16 activities regarding the Work or this Consent Decree.

17
18 XXXIII. MODIFICATION

19 123. Schedules for completion of the Work specified in this
20 Consent Decree may be modified by agreement of EPA and Asarco.
21 All such modifications shall be made in writing and a copy shall
22 be filed with the Court.

23 124. No material modifications shall be made to this
24 Consent Decree or Statement of Work without written notification

1 to and written approval of the Parties and the Court.

2 Modifications that do not materially alter those documents may be
3 made by written agreement between the Parties. A copy of any
4 such modification shall be filed with this Court.

5 125. Nothing in this Section shall be deemed to alter the
6 Court's power to supervise or approve modifications to this
7 Consent Decree.

8
9 XXXIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

10 126. This Consent Decree shall be lodged with the Court for
11 a period of not less than thirty (30) days for public notice and
12 comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C.
13 § 9622(d)(2), and 28 C.F.R. § 50.7. Asarco consents thereafter
14 to the entry of this Consent Decree without further notice. The
15 United States reserves the right to withdraw or withhold its
16 consent if the comments regarding the Consent Decree disclose
17 facts or considerations which indicate that the Consent Decree is
18 inappropriate, improper, or inadequate.

19 127. If for any reason the Court should decline to approve
20 this Consent Decree in the form presented, this agreement is
21 voidable at the sole discretion of any party and the terms of the
22 agreement may not be used as evidence in any litigation between
23 the Parties.

XXXV. SIGNATORIES/SERVICE

128. Each undersigned representative of Asarco, the Assistant Attorney General for Environment and Natural Resources of the Department of Justice, and the U.S. Environmental Protection Agency certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

129. Asarco hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified Asarco in writing that it no longer supports entry of the Consent Decree.

130. Asarco shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. Asarco hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS _____ DAY OF _____, 19__.

United States District Judge


1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States v. ASARCO Incorporated relating
3 to the Commencement Bay Nearshore/Tideflats Superfund Site.
4

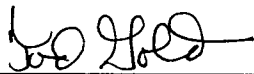
5 FOR THE UNITED STATES OF AMERICA

6 Date: _____

7 Barry M. Hartman
8 Acting Assistant Attorney General
9 Environment and Natural Resources
10 Division
11 U.S. Department of Justice
12 Washington, D.C. 20530

13 Environmental Enforcement Section
14 Environment and Natural Resources
15 Division
16 U.S. Department of Justice
17 Washington, D.C. 20530

18 
19 Dana A. Rasmussen
20 Regional Administrator
21 Region 10
22 U.S. Environmental Protection Agency
23 1200 Sixth Avenue
24 Seattle, WA 98105

25 
26 Tod Gold
27 Assistant Regional Counsel
28 Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, WA 98105

1
2 Assistant United States Attorney
3 Western District of Washington
4 U.S. Department of Justice
5 3600 Seafirst Fifth Avenue Plaza
6 Seattle, WA 98104
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28 CONSENT DECREE FOR INTERIM
REMEDIAL ACTION -- PAGE 84

U.S. DEPARTMENT OF JUSTICE
Env't. Enforcement, P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 514-1491

17 THE UNDERSIGNED PARTY enters into this Consent Decree in the
2 matter of United States v. ASARCO Incorporated, relating
3 to the Commencement Bay Nearshore/Tideflats Superfund Site.
4

5 FOR ASARCO INCORPORATED

6
7 Date:

August 28, 1991

Augustus B. Kinsolving

8 Augustus B. Kinsolving
9 Vice President, General Counsel and
Secretary
ASARCO Incorporated
180 Maiden Lane
New York, New York 10038

11 Agent Authorized to Accept Service on Behalf of Above-signed
12 Party:

Michael R Thorp

13 Michael Thorp
14 Heller, Ehrman, White & McAuliffe
15 1400 First Interstate Plaza
1201 Pacific Avenue
Tacoma, WA 98402-4308